

Gyimesi (Migration) [2021] AATA 3731 (28 September 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Judit Gyimesi
VISA APPLICANT:	Mr Gabor Koch
CASE NUMBER:	1801729
DIBP REFERENCE(S):	BCC2016/4073324/OSF2017/053181
MEMBER:	James Lambie
DATE:	28 September 2021
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations • r.2.03A

Statement made on 28 September 2021 at 12:12pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine relationship – relationship started soon after review applicant granted permanent residency and separated from husband – registration of civil partnership within 12 months of relationship starting – application for partner visa made after visa applicant’s application for further student visa refused – financial, household and social aspects of relationship – separate banks accounts for business purposes, and joint account for rent and household expenses – ex-husband’s name incorrectly on rental lease – visa applicant’s role in lives of review applicant’s young adult children – nature of commitment – relationship not disclosed in student visa application, and other inconsistent information – relationship now 5 years’ duration – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(2), 65

Migration Regulations 1994 (Cth), rr 1.09A(3), 2.03A(5), Schedule 2, cls 309.211, 309.221

Acts Interpretation (Registered Relationships) Regulations 2008

Civil Partnerships Act 2011 (Qld)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 12 December 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 2 December 2016 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because there was insufficient evidence to establish that the parties were in a de facto relationship.
4. Ms Gyimesi appeared before the Tribunal on 10 March 2020 and 27 April 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, Mr Koch and the review applicant's daughter, Ms Martina Gyimesi.
5. The review applicant was represented in relation to the review by her registered migration agent and the representative attended both hearings.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the parties are in a spouse or de facto relationship.

Whether the parties are in a spouse or de facto relationship

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the de facto partner of the review applicant who is an Australian citizen.

Are the parties in a de facto relationship?

9. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
10. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this

decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

11. Ms Gyimesi first arrived in Australia from Hungary on 11 May 2012 as a dependent to her then-husband's subclass 457 visa. She was granted permanent residency on 22 July 2015. In September 2015, she applied for a divorce, which became final on 2 September 2016. The marital home was at McCurley Street, Wynnum. There are two children of the marriage, who were aged 17 and 19 at the time the marriage broke down.
12. Mr Koch first arrived in Australia from Hungary on 28 July 2012 on a tourist visa, returning to Hungary on 26 October 2012. He returned to Australia on 31 October 2012 and applied for a subclass 573 student visa, which was granted on 12 February 2013. A further student visa was granted on 30 June 2015, but an application for a further student visa, lodged on 5 July 2016, was refused on 3 March 2017.
13. The parties claim to have met on 15 October 2015, at which time Ms Gyimesi had separated from her husband and took a room in a share house in Holland Park, Brisbane, in which Mr Koch was also a tenant. They say their relationship became a committed one in January 2016, when they moved into the same room. In June 2016, the couple moved back to Ms Gyimesi's former marital home in Wynnum. That residence was shared with Ms Gyimesi's children, her former husband having moved out previously.
14. The parties obtained a civil partnership agreement in November 2016. The application for the partner visa was lodged on 2 December 2016 and was refused by the delegate on 13 December 2017.
15. For the purposes of the application to the Tribunal, the parties have submitted a substantial amount of material, including a copy of their civil partnership certificate dated 25 November 2016, bank statements, insurance statements, photographs, tax returns, travel and accommodation invoices, tenancy agreements, screenshots of social media posts, vehicle registration statements, furniture invoices, form 888 statutory declarations, a letter from their general practitioner, utility bills and a written submission from their representative. I have considered all of this material, in addition to the material available to the delegate.

16. *Financial aspects of the relationship*

17. In assessing the financial aspects of the relationship, I have considered the joint ownership of assets, joint liabilities, the extent of pooling of financial resources, any legal obligations owed by one party to the other, and any sharing of day-to-day household expenses.
18. Ms Gyimesi and Mr Koch have been joint tenants under the lease of their residence at Wynnum since 2017. They gave evidence that, because Mr Koch is not an Australian permanent resident, they have been unable to obtain a loan with him as a party to purchase real estate or other major items. The only substantial asset subject to a loan consists of furniture in respect of which Ms Gyimesi was the sole borrower. However, the evidence from their bank records is that the repayments on this loan are made jointly. The parties' cars are owned separately but their registrations are paid from the joint account.
19. An issue to which the delegate gave some weight was that, although the parties claimed to be living together at the rental property in Wynnum from June 2016, Ms Gyimesi's former husband's name was listed as a tenant when the lease was renewed in March 2016. The parties requested the landlord to amend the lease but, even when it was renewed in March 2017, Ms Gyimesi's former husband's name was automatically entered. The parties produced copies of emails to indicate their requests for the relevant amendment and a statutory declaration from Ms Gyimesi's former husband as to his residential history and I am

satisfied that their evidence is truthful in this respect. Since 2017, the lease renewals have been in the parties' names.

20. The parties produced comprehensive bank statements. Both maintain personal accounts for the receipt of their salaries: this is on the advice of their accountants because Mrs Gyimesi has been running her own business and Mr Koch works as a subcontractor with his own ABN. Work expenses and sundry purchases are paid from these accounts. Both make regular contributions to their joint account (xx8540), from which their rent and the bulk of their household expenses are paid. I am satisfied, taking into account the exigencies of their small businesses and Ms Gyimesi's provision for her children, that their finances are substantially pooled.
21. As noted above, Mr Koch has not been in a position to borrow money while he has been Australia. The extent to which the parties therefore owe legal obligations to each other is limited. However, I note that Ms Gyimesi is listed as a beneficiary to Mr Koch's superannuation fund. The parties have also produced their income tax returns for the 2016-17 to 2019-20 financial years in which they have nominated each other as their spouse.
22. The delegate found, on the limited bank statements available at the time, that the parties deposited their wages into the joint account but there was no significant evidence of shared expenses. As noted in paragraph 19 above, the more extensive bank statements available to the Tribunal provide a broader picture of their income and expenses over a period of some five years. I accept that, at the time they moved into the rented property in 2016, Ms Gyimesi still provided financial support to her children and was not seeking to impose any contribution on Mr Koch, given that her former husband shared this responsibility. The children having since grown up and moved out, the parties' financial affairs are more visibly integrated. The bank statements for recent years shows that payments for rent, groceries, household items, utility bills and entertainment are made predominantly from the joint account.
23. On the evidence presented by the parties, I am satisfied that the conduct of the parties' financial affairs is consistent with that which might be anticipated of persons in a spousal relationship.

24. Nature of the household

25. In assessing the nature of the household, I have considered any joint responsibility for care and support of children, the parties' living arrangements, and any sharing of housework.
26. As noted above, for some years Ms Gyimesi's children resided with the parties. Ms Gyimesi continues to make contributions to her children from time to time, as might also be expected. The evidence of the parties is that Ms Gyimesi's former husband continues to make his own parenting contributions and that he is present at major family events. I draw no adverse inferences from these arrangements, which are consistent with the maintenance of the best interests of the children of separated parents. The parties have also provided evidence, including a statutory declaration from Mrs Monika Dakane Kiraly, that they have been named as godparents of the daughter of their mutual friends and play a significant role in the life of that child.
27. Ms Gyimesi's son, Mark, now works as a tiler with Mr Koch, starting as an apprentice in May 2018. In his statutory declaration, he describes how much he has learned from him. Ms Gyimesi's daughter, Martina, gave evidence that Mr Koch has been present for many of her life's milestones, such as commencement and graduation from university and celebrating her getting a job. He has also provided the assistance that young adults occasionally need, such as helping her move house and picking her up from parties.

28. The evidence of the parties and of their witnesses, which I accept, is that Ms Gyimesi and Mr Koch live as a couple in their residence at Wynnum. They have presented evidence, in the form of mail and utility accounts addressed to them together at that address, as well as certificates of insurance, tax returns and receipts for various purchases. There is nothing to suggest that the parties maintain separate residences. Further, the evidence of Ms Gyimesi's children is that, since 2016, Ms Gyimesi and Mr Koch have resided together as a couple.
29. The evidence of the parties is that they share the housework, with Ms Gyimesi doing most of the internal cleaning and laundry and Mr Koch the outside work and the ironing. Ms Gyimesi takes the primary responsibility for grocery shopping and meal preparation and Mr Koch does any supplementary shopping that is required. Mr Koch, in more recent times, has done an increasing share of the cooking, which the parties describe as 'a new passion'. These arrangements were described in similar terms in the oral evidence of Martina.
30. On the basis of all of the evidence, I am satisfied that the nature of the household is as the parties have described and that it is consistent with that of persons in a spousal relationship.

31. Social aspects of the relationship

32. In assessing the social aspects of the relationship, I have considered whether the parties represent themselves to other people as being in a de facto relationship with each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake joint social activities.
33. The commencement of the relationship is described in paragraphs 13 and 14 above. The parties describe themselves as sociable and provided oral and documentary (including photographic) evidence of their participation in social events as a couple. These events are largely (but not exclusively) conducted with the family and within the Brisbane Hungarian community. Statutory declarations from Stephen Baird, Matthew Nisbet, Edina Nagy-Bodi, Monika Dakane Kiraly, Sandor Baloch, Akos Oszko, and Gabor Vizi were tendered, all of which described how they became aware of Ms Gyimesi and Mr Koch being a couple and their participation as a couple in a wide variety of social events. Mr Oszko, a friend of Mr Koch since 1988, describes hosting the couple for dinner in Hungary and having that invitation reciprocated in 2018. Martina, in her oral evidence, described the parties as "the real deal". Ms Gyimesi's former husband also provided a statutory declaration, in which he acknowledges meeting Mr Koch several times since January 2016 and, in particular, at Christmas gatherings with the children.
34. The parties provided evidence to the Tribunal of the basis upon which they plan and undertake social activities. In addition to their descriptions of the various events they host and at which they are guests, they produced documentary evidence of travel with other couples within their social circle. Mark and Martina gave evidence of their frequent family gatherings. Martina, in her statutory declaration, says: "they found their common passion in travelling around Australia... During the years I have never once doubted their true and genuine feelings for each other."
35. There is nothing to suggest that any of the evidence of the social aspects of the relationship is other than represented by the parties. I accept that the parties represent themselves to other people as being in a de facto relationship with each other, that their social circle recognises their relationship and that the parties plan and undertake social activities as a couple.

36.

37. Nature of the parties' commitment to each other

38. In assessing the nature of the parties' commitment to each other, I have considered the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
39. A considerable portion of the hearings was devoted to the circumstances in which the relationship was claimed to have commenced, and the timing of the application for the partner visa. The relevant events are briefly described in paragraphs 12 to 14 above. The events and their timing were significant factors in the delegate's decision. In summary:
- (a) Ms Gyimesi was granted her subclass 186 visa (entitling her to permanent residency) on 22 July 2015;
 - (b) Ms Gyimesi applied for a divorce from Mr Gyimesi in September 2015, moving out of the marital home in October 2015 to an address at Holland Park, at which time the parties say they met;
 - (c) the parties claim their relationship commenced in January 2016, cohabiting from that time;
 - (d) the parties claim they moved into the Wynnum residence in June 2016;
 - (e) Mr Koch lodged his application for a further student visa on 5 July 2016 (subsequently refused on 3 March 2017);
 - (f) Ms Gyimesi was granted a divorce on 2 September 2016; and
 - (g) the parties registered their de facto relationship on 25 November 2016, seven days before the lodgement of the partner visa application.
40. Three further complications were noted by the delegate:
- (a) Ms Gyimesi notified a change of address to the Queensland Department of Transport and Main Roads on 8 September 2015, one month prior to the date she claims to have left the Wynnum address;
 - (b) Mr Koch, in his application for the further student visa, provided the Holland Park address, one month after the parties claim to have moved into the Wynnum residence; and
 - (c) Mr Koch, in his application for the further student visa, gave his marital status as "never married", despite:
 - i. claiming, for the purposes of this application, to have been cohabiting with Ms Gyimesi for some six months; and
 - ii. having been in a relationship in Hungary with a Ms Franciska Czeko between 1998 and 2015.
41. At the hearing, the parties accepted that it was understandable that the delegate would have misgivings about aspects of the timeline of their relationship. However, in their evidence to the Tribunal, both were adamant that the proximity in time of Ms Gyimesi's acquisition of permanent residency and the commencement of their relationship was not a matter that had a bearing on the relationship itself. While the delegate found it relevant that the relationship could not be documented until around about the time of the lodgement of the further student

visa, Mr Koch was adamant that this had been misconstrued. He said that, having attained the Certificates III and IV in Business for which the previous visa had been granted, and his studies continuing, he had no anxiety about the grant of a further visa. The student visa application, he said, was refused only because he had made the partner visa application in the meantime.

42. For her part, Ms Gyimesi denied that her grant of permanent residency had any bearing on either the dissolution of her marriage or the commencement of the relationship with Mr Koch. She said that the marriage had been “problematic” for some time prior to her moving out of the Wynnum residence. This may explain the timing of the notification of change of address to Transport and Main Roads. Having not known Mr Koch before moving out, Ms Gyimesi could not have orchestrated the situation for his benefit. While I consider it is possible that the pending grant of permanent residency may have had some bearing on Ms Gyimesi not taking steps to dissolve the marriage earlier, there is nothing on the evidence before me to suggest that the dissolution of the marriage had anything to do with Mr Koch’s visa status.
43. The parties were also adamant, when questioned, that the registration of their relationship was not undertaken for the purposes of foreclosing enquiries about the prior duration of the relationship, but accept that it was obtained, at least partially, for the purposes of assisting the processing of the partner visa, on the advice of friends in the Hungarian community. They say that they received no professional advice that this was a necessary step. On the evidence, I consider that it must have been brought to the parties’ attention, most likely by friends or acquaintances, that a partner visa application could be made sooner if a civil partnership certificate was obtained. This is obviously supported by the fact that the parties do not claim that their de facto relationship commenced any earlier than January 2016, although it may have been open to them to do so.
44. On the matter of Mr Koch’s claimed marital status, the evidence is not entirely satisfactory. I note that the relationship to Ms Czeko had been previously declared in his initial student visa application. His explanation for not later declaring it is that, while in Australia, he became aware of the elements necessary to establish the existence of a de facto relationship and formed the view that the relationship with Ms Czeko did not qualify because she did not contribute to household expenses or share the housework. This is, of course, an easy claim to make but it in no way necessarily negates the existence of a prior de facto relationship. However, Mr Koch having previously declared it (albeit possibly for the purposes of establishing that he was, at the time, a genuine temporary entrant), I cannot come to a conclusion on the evidence that he has intentionally sought to mislead the Minister in this respect.
45. Mr Koch’s claimed marital status, when it comes to the relationship with Ms Gyimesi, is even more difficult to reconcile. In his statutory declaration of 18 March 2020, he says:
 46. *In my understanding, I have been in a de facto relationship with [Ms Gyimesi], while I am never married. Therefore, the never married option was selected in my student visa application.*
 47. *This was just an honest human error and we all make mistakes. Choosing “never married” made sense to us. I was in a de facto yet never married at the time.*
 48. *However, I have come to the realisation that this is not the case or at least choosing “never married” was not the most accurate answer.*
 49. *Please take my sincere apologies for providing the inaccurate information. This was truly not intentional and just an honest error when completing the forms.*

50. In my view, there is a strong possibility that Mr Koch failed to disclose the relationship with Ms Gyimesi in his student visa application in order to continue to satisfy the genuine temporary entrant criterion. Given that the student visa application was lodged, at the latest, some time after the parties had moved into the Wynnum residence and the spousal nature of their relationship was becoming well established, it appears at least possible that Mr Koch was hedging his position. This view might be supported by the fact that the Holland Park address had been incorrectly given on the student visa application. On the other hand, it is also possible (if somewhat less so) to accept Mr Koch's explanation that he has made an honest, although not entirely reasonable, mistake. On the evidence, I am unable to form a conclusion as to Mr Koch's intention or state of mind on this issue, other than to find that there is insufficient evidence before me to make a positive finding of a reasonable suspicion there has been a purposeful act by any person intended to mislead the Minister. I do not infer that these matters are adverse to an assessment of the nature of the parties' commitment to each other.
51. Having regard to the evidence of the parties, and of their witnesses, I am satisfied that theirs is a relationship of some five years duration, during which time they have lived together consistently in a spousal relationship. The evidence of the parties and their witnesses referred to above is consistent as to a strong bond of companionship and emotional support. Given the evidence of the parties that, following the resumption of international travel, they intend to marry in the presence of their Hungarian relatives and have taken steps to commence a business together and intend, if financially possible, to buy a house together, I am satisfied that they see the relationship as long-term.
52. Accordingly, I am satisfied that the parties have a mutual commitment to a shared life to the exclusion of others, that theirs is a genuine and continuing relationship, and that they lived together on a permanent basis. For the purposes of s.5CB(2)(d), there is no suggestion that the parties are related by family.
53. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
54. Therefore, the visa applicant meets cl.309.211 and cl.309.221.

Are the additional criteria for a de facto relationship met?

55. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
56. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
57. The applicant has provided evidence that the relationship is registered under the *Civil Partnerships Act 2011 (Qld)* as a kind of relationship prescribed in the *Acts Interpretation (Registered Relationships) Regulations 2008*: r.2.03A(5). Accordingly, the 12 month requirement does not apply.

58. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.
59. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

60. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations
 - r.2.03A

James Lambie
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).